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AKAY HOLDINGS SDN BHD v. ARCH REINSURANCE LTD

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
UMI KALTHUM ABDUL MAJID JCA
ZAMANI A RAHIM JCA

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[CIVIL APPEAL NO: W-02(IM)-1214-07-2015]
17 JUNE 2016

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CONTRACT: *Agreement – Terms – Subscription agreement and bond conditions secured by charge of lease – Default in repayment – Whether respondent entitled to exercise rights under charge – Whether conditional upon reference to arbitration – Whether 'dispute' pursuant to agreements established – Whether terms breached – Whether action premature – Arbitration Act 2005, s. 10*

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The appellant and the respondent entered into a subscription agreement ('subscription agreement') where the appellant issued, with the respondent as the investor, secured senior non-convertible bonds. Apart from the subscription agreement, bond conditions were attached to the subscription agreement. The appellant's obligations under the subscription agreement and bond conditions were secured by a charge on a mining lease. When the appellant defaulted in the payment under the bond conditions, the respondent

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took out an originating summons ('OS') for the sale of the mining lease. The appellant, *vide* encl. 3, sought to stay the OS premised on s. 10 of the Arbitration Act 2005. The gist of the appellant's ground was that there were in place three agreements, namely, the subscription agreement, bond conditions and the charge, which were interlocked together, and since there

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was an arbitration agreement to refer any dispute to a Singapore arbitral tribunal in the subscription agreement, the respondent was not entitled to exercise its right under the charge until there was a finding of an event of default by the Singapore arbitral tribunal. The High Court refused the appellant's application for stay in encl. 3 and hence, this appeal.

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Held (allowing appeal with costs)
Per David Wong Dak Wah JCA delivering the judgment of the court:

(1) The appellant, under the subscription agreement and the bond conditions, was fully entitled to have the so called dispute determined by an arbitration in Singapore as provided in the arbitration agreement.

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The disagreement between the parties did not fall within the meaning of 'dispute' in the subscription agreement. Hence, there was a 'dispute' which could be referred to arbitration in Singapore. (paras 25 & 31)

(2) The terms 'redemption of the bonds in accordance with the conditions'

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were not found in the charge document but only in the subscription agreement and the bond conditions. The charge was to secure the performance of the appellant in its obligations in issuing the secured senior non-convertible bonds to the respondent. Hence, the charge was

nothing but a collateral document to that of the subscription agreement and bonding conditions, in that, only when there was a breach of the terms and conditions of the same by the appellant can the respondent's rights under the charge be triggered into effect. (para 34)

(3) The application of a common sense approach of construction to the issue led to the irresistible conclusion that the three documents were indeed interlocked together and they could not be severed. In the upshot, the subject matter of dispute in the charge was the very subject matter in dispute in the subscription agreement and bond conditions. That being the case and since there was no arbitral finding that there has been a breach of the subscription agreement and bonding conditions by the appellant, any action pursuant the charge was premature. (paras 35 & 37)

Bahasa Malaysia *Headnotes*

Perayu dan responden memeterai suatu perjanjian pohon beli ('perjanjian pohon beli') di mana perayu mengeluarkan, dengan responden sebagai pelabur, bon-bon tinggi yang tidak boleh ditukar yang dijamin. Selain daripada perjanjian pohon beli, syarat-syarat bon dilekapkan kepada perjanjian pohon beli. Tanggungjawab perayu di bawah perjanjian pohon beli dan syarat-syarat bon dijamin oleh gadaian ke atas pajakan perlombongan. Apabila perayu ingkar dalam pembayaran di bawah syarat-syarat bon, responden memfailkan saman pemula ('SP') bagi jualan pajakan perlombongan tersebut. Perayu, melalui lampiran 3, memohon penangguhan SP menurut s. 10 Akta Timbang Tara 2005. Asas alasan perayu adalah bahawa wujud tiga perjanjian, iaitu, perjanjian pohon beli, syarat-syarat bon dan gadaian, yang saling berpaut antara satu sama lain, dan oleh sebab terdapat perjanjian timbang tara untuk merujuk apa-apa pertikaian kepada tribunal timbang tara di Singapura dalam perjanjian pohon beli, responden tidak berhak untuk melaksanakan haknya di bawah gadaian sehingga adanya dapatan mengenai keingkaran oleh timbang tara Singapura. Mahkamah Tinggi menolak permohonan perayu untuk penangguhan dalam lampiran 3 dan dengan itu, rayuan ini.

Diputuskan (membenarkan rayuan dengan kos)
Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

(1) Perayu, di bawah perjanjian pohon beli dan syarat-syarat bon, berhak sepenuhnya bagi pertikaian yang didakwa diputuskan oleh timbang tara di Singapura seperti yang diperuntukkan dalam perjanjian timbang tara. Pertikaian antara pihak-pihak terangkum dalam maksud 'pertikaian' dalam perjanjian pohon beli. Oleh itu, terdapat 'pertikaian' yang boleh dirujuk kepada timbang tara di Singapura.

(2) Terma-terma 'redemption of the bonds in accordance with the conditions' tidak terdapat dalam dokumen gadaian tetapi hanya dalam perjanjian pohon beli dan syarat-syarat bon. Gadaian tersebut adalah untuk menjamin pelaksanaan tanggungjawab perayu dalam mengeluarkan bon-bon tinggi yang tidak boleh ditukar yang dijamin kepada responden. Dengan itu, gadaian itu tidak lebih daripada dokumen sandaran kepada perjanjian pohon beli dan syarat-syarat bon, di mana, hanya apabila perayu melanggar terma-terma dan syarat-syarat, maka hak responden di bawah gadaian akan tercetus.

(3) Pemakaian pendekatan akal kepada pentafsiran isu tersebut menjurus kepada kesimpulan yang tidak boleh disangkal bahawa ketiga-tiga dokumen tersebut sememangnya berkait antara satu sama lain dan tidak boleh diasingkan. Oleh itu, perkara yang dipertikaikan dalam gadaian adalah pertikaian dalam perjanjian pohon beli dan syarat-syarat bon. Dengan itu dan oleh sebab tiada dapatan timbang tara bahawa terdapat pelanggaran perjanjian pohon beli dan syarat-syarat bon oleh perayu, apa-apa tindakan berikutan gadaian adalah pra-matang.

Case(s) referred to:

Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 9 CLJ 257 FC ***(refd)***

Lembaga Pelabuhan Kelang v. Kuala Dimensi Sdn Bhd & Another Appeal [2010] 9 CLJ 532 CA ***(refd)***

Manks v. Whitley [1912] 1 Ch 735 ***(refd)***

MBf Property Services Sdn Bhd & Anor v. Balasubramaniam K Arumugam [2000] 2 CLJ 230 CA ***(refd)***

Tjong Very Sumito and Others v. Antig Investments Pte Ltd [2009] 4 SLR 732 ***(refd)***

Legislation referred to:

Arbitration Act 2005, s. 10

For the appellant - Cecil Abraham, Roszimah Jamrus & Esther Yee; M/s Cecil Abraham & Partners

For the respondent - S Bhuvaneswary & Low Kin Fai; M/s Izral Partnership

[Editor's note: Appeal from High Court, Kuala Lumpur; Originating Summons No: 24FC-202-02-2015 (overruled)]

Reported by S Barathi

JUDGMENT

David Wong Dak Wah JCA:

Introduction

[1] This is an appeal against the decision of the High Court dated 7 July 2015, wherein the learned judge refused an application to stay proceedings in encl. 3 in respect of an application by the respondent for an order for sale of a mining lease owned by the appellant and charged to the respondent, pursuant to a foreclosure proceeding under the National Land Code.

[2] The aforesaid application for stay was made by the appellant pursuant to s. 10 of the Arbitration Act 2005.

[3] We heard the appeal and after given due consideration to submissions of respective counsel, we allowed the appeal with costs and now give our reasons.

Background Facts

[4] The appellant and the respondent had on 16 May 2013 entered into a subscription agreement (subscription agreement) where the appellant issued, with the respondent as the investor, secured senior non-convertible bonds in the sum of US$6 million (the bonds).

[5] The core purpose of the subscription agreement is provided in cl. 2.5 of the same wherein it states that the proceeds from the issue of the first tranche bonds and the second tranche bonds solely for the purposes of (i) repayment of the UOB loan and (ii) the exploration and development of the mining lease, and other general corporate purposes respectively.

[6] Apart from the subscription agreement, the bond conditions are attached as sch. 1 of the subscription agreement. Those conditions provide the timetable as to when the US$6 million should be paid to the respondent.

[7] To secure the appellant's obligations under the subscription agreement and bond conditions, a charge on a mining lease of Lot 2556, Mukim Gali, District of Raub, in the State of Pahang was executed and registered in favour of the respondent on 5 June 2013 (charge).

[8] The respondent on 15 December 2014 *via* a letter demanded from the appellant the payment of the sum of RM8,327,271, being the amount due and owing pursuant to cl. 8.1 of the bond conditions. The appellant failed to meet the aforesaid demand, triggering an event of default under the subscription agreement and the charge.

[9] In view of the event of default, the respondent through its solicitors issued a notice of default as prescribed by Form 16D of the NLC on the 22 January 2015 requiring the appellant to remedy the default within 30 days by paying the amount set out in the notice of default.

[10] The appellant, through its solicitor's letter dated 13 February 2015 to the respondent, disputed the respondent's contention of an event of default. The respondent was not satisfied with the appellant's reason for its contention that there was no event of default and hence took out this originating summons to obtain an order for sale of the mining lease.

[11] To counter the originating summons, the appellant took out an application in encl. 3, to stay the same premised on s. 10 of the Arbitration Act 2005. The gist of the appellant's ground for the s. 10 application was simply that there are in place three agreements, namely the subscription agreement, bond conditions and the charge, which are interlocked together,

A and since there is a provision in the subscription agreement an arbitration agreement to refer any dispute to a Singapore arbitral tribunal pursuant to the SIAC Rules and in accordance with the Singapore law, the respondent was not entitled to exercise its right under the charge until there is a finding of an event of default by the Singapore arbitral tribunal.

B **High Court Decision**

[12] The learned judge did not agree with the appellant and his reasons can be seen in paras. 11, 12 and 13 which are produced herein:

> [11] When an application is made by the chargee for an order for sale
> C under section 256 of the NLC, the court is not required to inquire into any breach of obligations in any underlying contracts, as the chargee's claim is not based on a contractual covenant but under the registered Charge. An application for an order for sale under section 256 of the NLC is a statutory remedy against the chargor in default and is not concerned with any contractual claims that the chargor may have against the chargee
> D or *vice-versa*. In this regard, I am bound by the pronouncements of higher authorities. See *Low Lee Lian v. Ban Hin Lee Bhd* [1997] 2 CLJ 36 (SC); *Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd* [1988] 1 MLJ 257 (SC); *Kandiah Peter v. Public Bank Bhd* [1994] 1 MLJ 119 (FC); and *OCBC Bank (M) Bhd v. Hotel Rasa Sayang Sdn Bhd* [2005] 7 MLJ 301.
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> E [12] Additionally, in the present proceedings, by Clause 8.18 of the Charge, it was agreed by parties that the Charge shall be governed by and construed in accordance to the laws of Malaysia. By the same Clause 8.18, it was also agreed by parties that they irrevocably and unconditionally submit to the nonexclusive jurisdiction of the Malaysian courts. Further, by Clause 6.1 of the Charge, it was agreed by parties that the Plaintiff as
> F charge is entitled to pursue its remedy for an order for sale under the NLC. Therefore, the Charge itself expressly stipulates that it is to be construed in accordance to Malaysian law and be enforced in accordance to the provisions of the NLC, and that the parties submit to the non-exclusive jurisdiction of the Malaysian Courts. In fact, unlike the Subscription Agreement and the Bonds Conditions, there is no arbitration
> G agreement found in the Charge, and none can be incorporated into a charge, the enforcement of which is governed by statue.
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> [13] Therefore, given the clear provisions of the NLC, I agree with the contention of counsel for the Plaintiff that the subject matter of this proceeding is not one that ought to be incumbent upon the findings of
> H an arbitral tribunal by reference to foreign law, as contended by learned counsel for the Defendant. And as such, I find that the subject matter of this proceeding falls squarely under the provisions of the Charge and not the Subscription Agreement or the Bonds Conditions.

Our Grounds Of Decision

I **[13]** Counsel for the respondent before us submitted that the learned judge was correct to find that the respondent's right is in "*rem*" and not in "*personam*". Further it was submitted that the respondent's right under the

charge is independent of the subscription agreement and bond conditions. And since there is no provision in the charge of an agreement for arbitration, the procedure regime in the National Land Code takes over.

[14] As for the appellant's position, it was submitted that there was a dispute as to whether there was in fact an event of default on the part of the appellant, triggering the demand made pursuant to the charge. The dispute was set out in the submission of the appellant's counsel at p. 21 and for completeness and clarity, we produce *in verbatim* herein:

> The Dispute - Frustration of Contract, Misrepresentation and Repudiatory breach of the Subscription Agreement on the part of the Respondent
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> 21. By a letter dated 05.12.2014 [ACBD Tab 8, p.437-440], the Appellant's solicitors based in Singapore rejected the Respondent's demand and responded as follows:
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> (a) Based on the representations in the Indicative Term Sheet, there was an understanding between parties that the Bonds would mature only after 2 years;
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> (b) The Respondent was aware that the Potential Buyer required three (3) months to conduct the necessary due diligence before making the first payment under the agreement;
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> (c) Given the Respondent's insistence that the sale should be completed as soon as practicable and the understanding that the Respondent had agreed to and would facilitate the completion of the sale, the parties envisaged that the due diligence would be completed before 21.10.2014;
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> (d) In view of the due diligence exercise to be completed by 21.10.2014, the Second Extension was structured to encompass the interim payments of US$ 1 million on 22.10.2014 and US$2 million on 22.11.2014;
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> (e) It was for this reason that the payment of US$1 million to the Respondent to be made on 22.10.2014 (i.e. one day after 21.10.2014) as the Potential Buyer make the down-payment of RM 7 million to the Appellant under the Potential Sale Agreement;
>
> (f) In the circumstances, the Appellant rejected the Respondent's demands for payment;
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> (g) Nevertheless, the Appellant remained amenable to resolving the matter amicably by way of friendly consultation pursuant to Clause 26.2 of the Subscription Agreement.
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> 22. Instead of engaging in friendly consultation and despite the Appellant's position that the dispute should be amicably resolved by way of friendly consultation, the Respondent issued a letter dated 15.12.2014 and demanded payment from the Appellant.

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23. Moreover, the Respondent, through a letter dated 15.12.2014 from its solicitors [ACBD Tab 9, p.573-575]:

a. Denied making the representations that it was agreeable to an extension of the maturity date of the Bonds in the event the Appellant found this to be necessary;

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b. Disagreed that Clause 26.2 of the Subscription Agreement provides for a pre-condition to the commencement of arbitration against the Appellant and that it is not contractually obliged to engage the Appellant in "friendly consultation in good faith" as per the wording of that Clause, positions which are strenuously disputed by the Appellant.

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24. In response, the Appellant's solicitors issued a letter dated 02.01.2015 disputing the Respondent's demand on a number of grounds, including its position that [ACBD Tab 9, p. 579-580]

a. The Respondent's refusal to allow the four (4)-week extension had frustrated the potential sale of the Mining Lease;

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b. The Respondent's frustration of the potential sale was inconsistent with the understanding between the parties and amounted to repudiatory breach on the part of the Respondent;

c. The Appellant suffered loss and damage as a result of the

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Respondent's repudiatory breach; and

d. In the circumstances, the Appellant rejected the Respondent's demand concerning the redemption of the Bonds.

[15] It was not contested by the respondent that the appellant under the subscription agreement and bond conditions is fully entitled to have the so

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called dispute determined by arbitration in Singapore as provided in the arbitration agreement. So premised on that, it is of course the appellant's contention that this application for sale of the mining lease pursuant to the charge is premature and hence a stay of the same should have been granted by the learned judge pursuant to s. 10 of the Arbitration Act 2005.

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[16] The relevant part of s. 10 of the Arbitration Act 2005 reads as follows:

(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to

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arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed;

(2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.

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(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

(4) This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia.

[17] Suffice for us to refer to the case *Lembaga Pelabuhan Kelang v. Kuala Dimensi Sdn Bhd & Another Appeal* [2010] 9 CLJ 532 where Low Hop Bing JCA explains succinctly at pp. 543-544 what is required of the court in s. 10 of the Arbitration Act 2005:

> [18] In my view, the general rule under s. 10(1) is that where proceedings are brought in respect of a matter which is the subject of an arbitration agreement, the peremptory word "shall" makes it mandatory for the court to grant a stay of those proceedings and refer the parties to arbitration ...
>
> [20] In considering the respective burden of proof under s. 6 (Singapore) in *Tjong Very Sumito*, *supra*, VK Rajah JA opined as follows:
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> > In order to obtain a stay of proceedings in favour of arbitration under s. 6, the party applying for a stay (the applicant) must first show that he is party to an arbitration agreement, and that the proceedings instituted involve a matter which is the subject of the [arbitration] agreement. In other words, the applicant has to show that the proceedings instituted fall within the terms of the arbitration agreement. If the applicant can show that there is an applicable arbitration agreement, then the court must grant a stay of proceedings unless the party resisting the stay can show that one of the statutory grounds for refusing a stay exists, ie, that the arbitration agreement is "null and void, inoperative or incapable of being performed.

[18] From the above, the court before granting the stay must be satisfied of the following:

(a) Is there a dispute within the four corners of the subscription agreement and bond conditions to refer to arbitration?

(b) Is the subject matter in the charge action the same subject matter as in the subscription agreement and the bond conditions?

(c) If so, should the arbitration proceeding be determined first before foreclosure action can be taken pursuant to the charge?

Dispute Within The Subscription Agreement And Bond Conditions

[19] Clause 26.2 of the subscription agreement provides as follows:

> Resolution of any controversy, dispute or claim between the Parties regarding or in connection [with] this Agreement (including the interpretation, performance, breach, termination or validity of this Agreement) (Dispute) shall initially be resolved through friendly consultation in good faith with a view to achieving a resolution between the Parties. If such friendly consultation fails to resolve the Dispute within ten (10) Business Days from the commencement of such consultation, any Party may submit the Dispute for arbitration in accordance with this Clause 26.

[20] What amounts to a "dispute" is set out in the case of *Tjong Very Sumito and Others v. Antig Investments Pte Ltd* [2009] 4 SLR (R) 732, at pp. 766-767 where the Court of Appeal in Singapore held as follows:

> (c) In line with the prevailing philosophy of judicial non-intervention in arbitration, the court will interpret the word "dispute" broadly (see [28, [29], [33], and [34] above), and will readily find that a dispute exists unless the defendant has unequivocally admitted that the claim is due and payable (see [56] and [59] above). The court should not be astute in searching for an admission of a claim, and would ordinarily be inclined to find that a claim is not admitted in all but the clearest of cases (see [61] above).
>
> (d) There is undoubtedly a "dispute" referable to arbitration if the defendant expressly asserts that he denies the claim (see [49] above)
>
> (e) The court will not assess the merits of a denial/defence or the genuineness of a "dispute" since these matters should properly be left to the arbitrator to assess (in accordance with the parties' contractual bargain to arbitrate) (see [40] and [49] above)
>
> (f) Apart from an express denial or rejection of the claim, the court can also infer that the claim is not admitted from the previous inconclusive discussions between parties, prevarication or even silence (see [61]) above.

[21] In our earlier para. 14, we had set out the dispute from the perspective of the appellant and in our view it could not denied that the disagreement between the parties does fall within what is meant by "dispute" in the subscription agreement. Hence we had no problem in finding that there is a "dispute" which can be referred to arbitration in Singapore which brought us to the next element of s. 10 of the Arbitration Act 2005 and that is whether the subject of dispute is the same as in the charge action.

Subject Matter Of Dispute

[22] In our view the starting point must be the reason for the creation of the charge on the mining lease in the whole scheme of things. The answer is simply what is stated in the recitals of the annexure to the charge and for clarity and completeness they read as follows:

> WHEREAS:
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> (A) On the terms of a Subscription Agreement dated ... entered into between the Charger (as the Issuer) and the Chargee (as the Investor) (the "Subscription Agreement", which expression, where the context so admits, shall include the amendments made pursuant to any other amendment(s) or variation(s) thereof and addition(s) thereto and any other instrument(s) executed supplemental thereto or in substitution thereof), the Chargor proposes to issue to the Chargee secured senior non-convertible bonds with an aggregate principal amount of US$6,000,000 in two tranches as follows:
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> (a) bonds with an aggregate principal amount of US$1,000,000; and
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> (b) bonds with an aggregate principal amount of US$5,000,000.

(B) The Bonds (as defined in the Subscription Agreement) will be in registered form, in the denomination of US$100,000 each and integral multiples thereof. Title to the Bonds will be registered in the name of the Chargee.

(C) It is one of the conditions of the Subscription Agreement that the Chargor executes and delivers this Charge in favour of the Chargee as security for the payment and repayment of the Secured Amounts (as defined below) and upon the terms and subject to the conditions herein contained.

[23] Apart from the above, there are also some telling clauses in the charge document and they are:

Covenant to Pay

2.1 Covenant to pay: The Chargor covenants with the Chargee that it shall on demand by the Chargee duly and punctually pay or discharge to the Chargee the Secured Amounts in accordance with the provisions of the Transaction Documents (including the Conditions).

6.1 Statutory Notice

(i) In the event of any breach by the Chargor of the covenant to pay under Clause 2.1 and such breach occurring and continuing for a period of seven (7) days, it shall be lawful for the Chargee forthwith to give notice pursuant to the provisions of the National Land Code requiring the Chargor to remedy the breach within a period of thirty (30) days from the date on which such statutory notice is served or deemed to be served under the provisions hereof;

(ii) If an Event of Default and/or Early Redemption Event occurs and the Chargor fails to redeem all or any of the Bonds in accordance with the Conditions, it shall be lawful for the Chargee forthwith to give the statutory notice pursuant to the provisions of the National Land Code requiring the Chargor to remedy the said breach within a period of thirty (30) days from the date of such statutory notice.

[24] Counsel for the appellant had rightly pointed out that the terms "redemption of the bonds in accordance with the conditions" are not found in the charge document but only in the subscription agreement and the bond conditions. This of course was understandable as the birth of the charge was tied to the existence of the subscription agreement and bonding conditions. The charge in simple language was to secure the performance of the appellant in its obligations in issuing the secured senior non-convertible bonds to the respondent. Hence it could be said that the charge was nothing but a collateral document to that of the subscription agreement and bonding conditions in that only when there is a breach of the terms and conditions of the same by the appellant can the respondent's rights under the charge be triggered into effect.

[25] Further by applying a common sense approach of construction to the issue at hand, in our view, led to the irresistible conclusion that the three documents are indeed interlocked together and they cannot be severed. The Federal Court had in *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257; [2011] 6 MLJ 464, at pp. 268-269 (CLJ); pp. 475-476 (MLJ), dealt with a similar contention of interlocking agreements and had this to say:

> [15] The crux of the Plaintiff's argument is that the courts below fell into error by construing the PDA as a stand-alone agreement. Counsel for Plaintiff submitted that there were four Agreements executed on the same date (7th January 1993) namely the main agreement, the new property development agreement, the property sales agreement and the PDA. It was therefore contended by the learned counsel that the four agreements were interlocking in nature and ought to be considered as a whole. In other words, none of the said agreements could be considered in isolation. And he pointed out that a close scrutiny of all four agreements would show the commercial intention behind the bargain of the parties which was that the plaintiff had bought the right to remain on the subject land and develop the whole or any part of the land at its own pace and discretion. It was also emphasised that the plaintiff had in fact performed its obligations under the other Agreements such as the payments of RM40m. Such payment should be taken into account as consideration since all the four Agreements were interlocked.
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> [18] In any event, we do not think it is in dispute in that the general rule is that where several deeds are executed at the same time (contemporaneously executed), reference should be made to all the deeds to ascertain the intention of the parties. (See: *Manks v. Whitley* [1912] 1 Ch 735; [1914] AC 132 and *Mohamed Isa v. Abdul Karim* [1970] 2 MLJ 965).

[26] This court had also in *MBf Property Services Sdn Bhd & Anor v. Balasubramaniam K Arumugam* [2000] 2 CLJ 230; [2000] 2 MLJ 267, at p. 234 (CLJ); pp. 270-271 considered the decision of the English Court of Appeal in *Manks v. Whiteley* [1912] 1 Ch 735 and held that:

> ... The three documents; the sale and purchase agreement, the agreement with the first appellant and the loan agreement with the second appellant, must be read together as they form part of the same transaction. This is in accordance with settled principles of law.
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> Thus, in *Manks v. Whitely* [1912] 1 Ch 735, Fletcher Moulton LJ said (at p 754):
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> > [W]here several deeds form part of one transaction and are contemporaneously executed, they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties, they must be equities arising out of the transaction as a whole. It is not open

> to third parties to treat each one of them as a deed representing a separate and independent transaction for the purpose of claiming rights which would only accrue to them if the transaction represented by the selected deed was operative separately. In other words, the principles of equity deal with the substance of things, which in such a case is the whole transaction, and not with unrealities such as the hypothetical operation of one of the deeds by itself without the others.

[27] The upshot of it all was simply that the subject matter of dispute in the charge was the very subject matter in dispute in the subscription agreement and bond conditions. That being the case and since there is no arbitral finding that there has been a breach of the subscription agreement and bonding conditions by the appellant, any action pursuant the charge is premature. With respect to the learned judge, to say that the respondent was exercising its right *in rem* was in fact "putting the cart before the horse" so to speak. The respondent can only possess that right in "*rem*".

[28] When the appellant had been found by an arbitral tribunal to be in breach of the subscription agreement and bond conditions. The learned judge fell into error, with respect, when he did not treat the interlocking nature of the three documents. Had he done so, we were sure he would have come to a conclusion as we had.

Conclusion

[29] This is a case where the court must look at the commercial reality and circumstances in which the charge document was created. Its very existence was anchored on the subscription agreement and bond conditions and to ignore such fundamental nature of the whole scheme of things would invariably lead to a wrong construction of the terms and conditions of the three agreements as was in this case.

[30] For reasons stated above, we allowed the appeal with agreed costs in the sum of RM20,000 for here and below. Deposit to be refunded. We also ordered that the High Court orders be set aside and granted prayers 1 and 2 of encl. 3, the gist of which the originating summons is stayed pursuant to s. 10 of the Arbitration Act 2005.